STATE OF MICHIGAN

COURT OF APPEALS

PRIME FINANCIAL SERVICES, LLC,

Plaintiff-Appellee,

v

CASEY VINTON,

Defendant,

and

BANK ONE, N.A., f/k/a BANK ONE MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
January 6, 2011

No. 290735
Kent Circuit Court
LC No. 01-010952-CK

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

BECKERING, J. (*dissenting*).

I respectfully dissent. I would affirm the trial court's February 12, 2009, order that granted Defendant Bank One's motion for costs under MCR 2.405(D)(2), but denied its motion for attorney fees on the ground that the interest-of-justice exception set forth in MCR 2.405(D)(3) applied under the circumstances of this case.

Specifically, I disagree with the majority's conclusion that because the parties "are sophisticated business entities represented by experienced counsel" who "know how to protect their own interests," and "are well equipped to evaluate the risks and rewards" of choosing litigation over settlement, the "significant public interest in encouraging settlement between sophisticated business entities" should prevail over any interest-of-justice exception arising out of the presence of issues of first impression. Although the majority cites *Luidens v 63rd Dist Court*, 219 Mich App 24, 35; 555 NW2d 709 (1996), in support of its proposition that "awarding attorneys fees in matters involving sophisticated parties and complex financial transactions furthers MCR 2.405's purpose of encouraging settlement," *Luidens* states that the "[p]arties' economic standing should not determine whether they face the risk of costs and attorney fees in

rejecting an offer of judgment."[1] *Id*. at 34. The majority has essentially determined that because of Prime Financial Services, LLC's (Prime Financial's) economic standing—wherein it can afford experienced counsel—and its own sophistication as a business entity, the trial court does not have the discretion to invoke the interest-of-justice exception.[2] I find this analysis flawed and in contradiction to our finding in *Luidens*. Regardless of the parties' economic wherewithal and level of sophistication, the trial court did not abuse its discretion because, as the trial court aptly put it, ". . . this case involved several issues of first impression, and [] the development of the law in this important and prevalent area was furthered by this case not settling . . . ."

The majority opinion correctly states the standard of review and accurately recites the law pertaining to a party's entitlement to attorneys fees under MCR 2.405 and the interest-of-justice exception set forth in MCR 2.405(D)(3). As such, I will not repeat the applicable law. The question before us is simply whether the trial court abused its discretion in applying the interest-of-justice exception under the circumstances presented in this case. Because the trial court based its application of the interest-of-justice exception on its conclusion that several issues of first impression existed, and Bank One contends there were no issues of first impression, analysis as to whether the resolution of this case involved issues of first impression is appropriate.

In *Luidens*, 219 Mich App at 35, this Court noted that the interest-of-justice exception might apply to cases "involving a legal issue of first impression," but courts of this state have not yet defined, in a published opinion, what qualifies as an issue or a case of first impression. Black's Law Dictionary (7th ed) defines a "case of first impression" as "a case that presents issues of law that have not previously been decided in that jurisdiction.'" Under that basic definition, I conclude that this Court did, in fact, address issues of first impression in disposing of the previous appeal in this case. The majority agrees.

As indicated by the majority, the primary issues before this Court in the first appeal were "whether prior Article 9 of the Uniform Commercial Code [UCC] governed the creation of a security interest in a note secured by a mortgage and, if it did, whether a properly recorded assignment of mortgage could give the assignee greater rights to the note than the assignee had

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[1] *Luidens* involved an age discrimination claim brought by a chief probation officer against his employer, a district court. The plaintiff lost at trial, and the defendant qualified for attorney fees under MCR 2.405(3). This Court rejected the trial court's decision not to award attorney fees on the basis of the disparity of economic standing between the parties and the non-frivolousness of the plaintiffs' case. *Luidens*, 219 Mich App at 34, 37.

[2] It is noteworthy that Bank One did not raise the novel argument upon which it ultimately prevailed (or, as the trial court explained, at least not in a way that would allow the trial court to render a decision) until after it lost at trial and filed a JNOV. The fact that Bank One apparently failed to recognize its own winning argument until late in the game undermines the majority's implicit conclusion that Prime Financial, as a sophisticated business entity, should have foreseen this potential loss and settled earlier.

under Article 9." *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 248; 761 NW2d 694 (2008). In order to determine whether Bank One's actions with regard to the notes and mortgages at issue could support Prime Financial's claims, this Court had to determine the nature and extent of the parties' interests in the notes and mortgages. *Id*. at 256. This Court found that it was undisputed that Bedford Financial, Inc. (Bedford) originated all of the notes and mortgages, and it concluded that "after the individual consumers executed the notes and mortgages at issue in favor of Bedford, Bedford owned those notes as personal property, which it could in turn transfer or pledge to third parties." *Id*. at 256-257. This Court observed that "Bedford could not transfer the mortgages separately from the underlying notes," and, therefore, that "the interests held by Prime [Financial] and Bank One must be ascertained by determining whether and to what extent Bedford granted an interest in the notes to Prime [Financial] and Bank One." *Id*. at 257.

In turning to Prime Financial's interest in the notes and mortgages, this Court acknowledged that "the parties dispute whether Article 9 of Michigan's [UCC] applied to the interests at issue." *Id*. In deciding the threshold question of which version of the UCC applied to the case, this Court stated:

> We note that the actions taken by Bank One, which Prime alleges to have been unlawful, all occurred before the enactment of the current version of Article 9, which became effective on July 1, 2001. See 2000 PA 348. Although the current version of Article 9 generally applies to actions commenced after its effective date, even when the liens at issue were created before the effective date, see MCL 440.9702(1) and (3) (2001); but cf. *Fodale v Waste Mgt of Mich, Inc*, 271 Mich App 11, 17; 718 NW2d 827 (2006) (concluding, without analyzing MCL 440.9702 [2001], that § 5 of prior Article 9 governed the default at issue because the agreements and actions at issue were made before 2001—even though the plaintiff did not sue until after 2001), because Prime's claims are common-law claims premised on the propriety of Bank One's actions under the prior version of Article 9, we conclude that Bank One's actions must be analyzed in light of its rights and duties under the prior act. Furthermore, where the relative priorities of parties were established before the effective date of revised Article 9, the article "as in effect before this amendatory act takes effect determines priority." MCL 440.9709(1) (2001). Hence, to the extent that prior Article 9 applied and established the respective priorities of the parties in the notes at issue, that priority governs the parties' security interests. [*Prime Fin Servs LLC*, 279 Mich App at 258.]

Although this Court did not explicitly state that it was considering an issue of first impression, it impliedly did so. Bank One's initial appeal in this case was the first time that a court of this state analyzed the relevant sections of the prior and current versions of Article 9 of the UCC to identify the controlling version. This Court acknowledged that "the current version of Article 9 generally applies to actions commenced after its effective date" under MCL 440.9702(1) and (3). *Prime Fin Servs LLC*, 279 Mich App at 258. But this Court then cited *Fodale*, 271 Mich App at 17, wherein it concluded that prior Article 9 controlled where the agreements at issue were made before the enactment of present Article 9; however, that decision contained no relevant analysis of that issue. *Prime Fin Servs LLC*, 279 Mich App at 258. This

Court ultimately concluded that the prior version of Article 9 controlled because Prime Financial raised common-law claims premised on the propriety of Bank One's actions under the prior version. *Id.* The prior version of Article 9 also controlled based on the exception in MCL 440.9709(1). *Prime Fin Servs LLC*, 279 Mich App at 258. In addition, this Court went to great lengths to explain the applicability of prior Article 9, which governed "'any transaction (regardless of its form) which is intended to create a security interest in *personal property* or fixtures,'" but not "'to the creation or transfer of an interest in or lien on real estate.'" *Id*. at 258-259, quoting MCL 440.9102(1)(a); MCL 440.9104(j). In concluding that the prior version applied to the creation of a security interest in the notes secured by mortgages, this Court relied on *Union Guardian Trust Co v Nichols*, 311 Mich 107, 115; 18 NW2d 383 (1945), which held that a note secured by a mortgage is personal property, relevant sections of prior Article 9, a comment to prior Article 9, and two federal district cases, *In re SGE Mtg Funding Corp*, 278 BR 653, 657-659 (MD Ga, 2001), and *In re Atlantic Mtg Corp*, 69 BR 321, 324 (ED Mich, 1987). *Prime Fin Servs LLC*, 279 Mich App at 259-260. Because this issue had not yet been thoroughly analyzed by a court of this state, the trial court did not err in finding that this Court addressed an issue of first impression in "determine[ing] that prior Article 9 of the UCC applied to determine priority when a party has a security interest in a note secured by a mortgage."

After determining that Prime Financial had a security interest in the notes at issue, *id*. at 261-263, this Court addressed whether a secured party could perfect a security interest under prior Article 9 by designating the debtor as its agent for the purpose of possessing the collateral. This Court concluded that Prime Financial's security interest was unperfected under prior Article 9, noting that under the prior version, "a secured party could perfect its interest in instruments only by taking possession of the instruments." *Id*. at 264, 267. "Bedford retained possession of the notes at issue during all relevant periods," and "Bedford could not possess the notes at issue on Prime's behalf." *Id*. at 267. This Court explained that the debtor—Bedford in this case—could not "qualify as the agent for a secured party for purposes of taking possession of collateral because the continued possession by the debtor establishes the opportunity for fraud." *Id*. at 265. In reaching this conclusion, this Court stated:

> Although a secured party could take possession through an agent, "the debtor or a person controlled by him cannot qualify as such an agent for the secured party." MCL 440.9305, comment 2; cf. MCL 440.9313 (2001), comment 3 (stating that the "debtor cannot qualify as an agent for the secured party for purposes of the secured party's taking possession").
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> On appeal, Prime contends that comment 2 to MCL 440.9305 does not accurately reflect the law. However, the majority of courts that have examined the issue have rejected the notion that a secured party can perfect its security interest by designating the debtor as its agent. See, e.g., *Edibles Corp v West Ontario Street Ltd Partnership*, 273 Ill App 3d 550; 653 NE2d 45 (1995); *In re Rolain*, 823 F2d 198 (CA 8, 1987); *In re Atlantic Mortgage Corp, supra* at 331; *Heinicke Instruments Co v Republic Corp*, 543 F2d 700 (CA 9, 1976); *In re Copeland*, 531 F2d 1195 (CA 3, 1976); see also 1A-6A Worley & McDonnell, Secured Transactions Under the UCC § 6A.04 (noting that there are "important limitations to the general principle of possession-by-agency" and stating that the "most important of these limitations is that the secured party cannot perfect its

> security interest by designating as its agent the debtor or someone closely associated with the debtor"). [*Prime Fin Servs LLC*, 279 Mich App at 264-265.]

Considering the foregoing analysis, and contrary to Bank One's argument on appeal, the trial court did not err in finding that this Court addressed an issue of first impression in "consider[ing] whether a secured party could perfect a security interest under prior Article 9 by designating the debtor as its agent for the purposes of possessing the collateral." This issue had not yet been addressed by a court of this state. In addressing it, this Court relied on comments to prior Article 9, as well as an Illinois Court of Appeals' case, federal case law, and Worley & McDonnell, Secured Transactions Under the UCC, which represented the majority view of comment 2 to MCL 440.9305.

Furthermore, I cannot conclude the trial court erred in finding that this Court addressed an issue of first impression in "determin[ing] whether Michigan would separately analyze an assignment of a mortgage under real property law and the security interest in the note under the UCC." In addressing this issue, this Court first noted that "this is not a case where the parties intended to evidence a transfer of ownership of the note and mortgage through the recording of an assignment of the mortgage. Rather, because the parties only intended Prime to have a security interest in the notes and mortgages, prior Article 9 clearly governed the security interests in the notes." *Prime Fin Servs LLC*, 279 Mich App at 267 (citation omitted). This Court further noted that "courts have struggled with the effect, if any, that real estate law has on the perfection of a security interest under prior Article 9 in a note that was itself secured by a mortgage." *Id*. at 267-268. Citing relevant federal case law and other sources, this Court explained:

> As already noted, prior Article 9 encompassed the creation of a security interest in an instrument, even if that instrument was itself secured by an underlying mortgage. See MCL 440.9102, comment 4. However, comment 4 also left "to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee's interest." *Id*. This commentary has led some courts to use a bifurcated approach in determining a secured party's interest in a note and mortgage. See *In re Maryville Loan & Savings Corp*, 743 F2d 413 (CA 6, 1984), clarified on reconsideration 760 F2d 119 (CA 6, 1985); *In re Atlantic Mortgage Corp*, *supra* at 324 (relying on *In re Maryville* for the proposition that Michigan's UCC must be read to require a bifurcated approach); *Provident Bank v Community Home Mortgage Corp*, 498 F Supp 2d 558, 565 (ED NY, 2007). Under the bifurcated approach, prior Article 9 would govern priorities in the note, but real property law would govern priorities in the mortgage. *In re Maryville*, *supra* at 415-417. Hence, where two parties have a security interest in a single note, which is secured by a mortgage, one party could have priority in the note under prior Article 9 and the other could have priority in the mortgage under real property law.
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> > But other courts have recognized that separately analyzing the perfected status of the note and mortgage is simply inconsistent with the basic principle that the note controls the mortgage. In their view, this inconsistency means that Comment 4 must be either ignored or limited in its application to contexts other than

> determination of the perfection of the assignee's interest. In this view, the creditor gains a perfected security interest in the note and mortgage and their proceeds so long as it is perfected as to the note, and it is not necessary to consult real estate law to determine whether the creditor's interest in the mortgage is perfected. [1C-16 McDonnell, Secured Transactions Under the UCC, § 16.09(2)(c).]

[*Prime Fin Servs LLC*, 279 Mich App at 268-269.]

Considering these approaches, this Court rejected "the notion that, under Michigan real property law, by recording an assignment of mortgage incident to a secured transaction, a secured party can obtain a greater security interest in a mortgage than it has in the note underlying the mortgage." *Id*. at 269. This Court concluded:

> . . . under Michigan's real property law—the "other law" of comment 4 to MCL 440.9102—the assignment of a mortgage securing a note as part of a secured transaction does not give the assignee any greater rights to the note than the assignee would have had under prior Article 9. And, because the mortgage follows the note, [*Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942)], the assignee of a mortgage cannot have a greater security interest in the mortgage than it has in the underlying note. Cf. *In re Atlantic Mortgage Corp, supra* at 325 (interpreting Michigan's prior Article 9 and real property law and concluding that, "if an investor's interest in the underlying debt is subordinate to the trustee's, the investor's superior interest in the mortgage does not give the investor any right to collect the debt," and, consequently, "an investor without possession of the underlying note retains no rights incident to either the note or the mortgage").
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> We note that this approach is consistent with the approach adopted by Michigan's Legislature with the enactment of revised Article 9. . . .
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> Thus, under revised Article 9, Bedford's assignment of the mortgages securing the notes at issue to Prime would also have had no effect on its security interest.
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> Prime did not obtain any greater rights to the notes at issue by recording assignments of the underlying mortgages than it had under prior Article 9. Consequently, notwithstanding Bedford's assignment of mortgages to Prime, Prime had only unperfected security interests in the notes at issue, which could be subordinate to the rights of other secured creditors. [*Prime Fin Servs LLC*, 279 Mich App at 269-272.]

Because a court of this state had not yet considered whether to separately analyze an assignment of a mortgage under real property law and the security interest in the note under the UCC, and whether, by recording an assignment of a mortgage, a secured party could have a greater security interest in the mortgage than it had in the underlying note, the trial court did not err in finding that this Court addressed an issue of first impression.

Bank One argues that even if this Court addressed one or more issues of first impression in the first appeal, no public interest was served by having those issues judicially decided and, therefore, that the interest-of-justice exception is inapplicable. I disagree. In *Luidens*, 219 Mich App at 35-36, this Court discussed examples of "unusual circumstances" that might trigger application of the interest-of-justice exception and indicated that there is a public interest in having some issues, such as legal issues of first impression, "judicially decided rather than merely settled by the parties" and that "this public interest may override MCR 2.405's purpose of encouraging settlement." Similarly, this Court stated in *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 391; 689 NW2d 145 (2004), that "the exception may be applicable when . . . litigation of the case affects the public interest, such as a case resolving an issue of first impression."

In regard to the specific issues of first impression addressed in the first appeal, I do not agree with Bank One that "no new ground was broken" that would serve the public interest. Here, the jury initially returned a verdict in favor of Prime Financial. On appeal, this Court elected to issue a published opinion, addressing at least three issues of first impression and reversing the verdict. As Bank One points out, those issues of first impression involved interpretation and application of the prior version of Article 9 of the UCC, which had already been replaced by the current version. But at the time this case was litigated, and for some time thereafter, parties to other actions may have found it necessary, as did the parties here, to determine which version of Article 9 applied to their particular cases. Some parties may have found prior Article 9 applicable. Further, in resolving the third issue of first impression presented in the first appeal, this Court held that "under Michigan's real property law—the 'other law' of comment 4 to MCL 440.9102—the assignment of a mortgage securing a note as part of a secured transaction does not give the assignee any greater rights to the note than the assignee would have had under prior Article 9. And, because the mortgage follows the note, the assignee of a mortgage cannot have a greater security interest in the mortgage than it has in the underlying note." *Prime Fin Servs LLC*, 279 Mich App at 269-270 (citation omitted). Importantly, the Court noted that this approach is consistent with the approach now codified in current Article 9. *Id*. at 270. In resolving the other issues of first impression, this Court also shed light on important distinctions between the prior and current version of Article 9. See, e.g., *id*. at 264 n 9, and 268 n 10. Accordingly, I would hold that the trial court did not abuse its discretion in finding that the public interest was served by judicial review of this case and in applying the interest-of-justice exception set forth in MCR 2.405(D)(3). As stated above, I respectfully disagree with the majority's conclusion that Prime Financial's status as a "sophisticated business entity" and the purported "public interest" in settling complex financial transactions somehow disqualifies Prime Financial from invocation of the interest-of-justice exception in a case where

several issues of first impression were involved, the resolution of which furthered the development of the law.[3]

/s/ Jane M. Beckering

[3] I note that in its brief on appeal, Bank One did not raise Prime Financial's sophistication as a business entity as a ground for challenging the trial court's application of the interest-of-justice exception.